IN THE

Supreme Court of the United States

October Term, 1946

No. 607

JOHN H. PADEN AND A. V. ARMAGOST, INDIVIDUALLY AND RESPECTIVELY, AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellants,

vs.

PAUL J. MAHONEY, C. E. NEWHOUSE, WINNIE BUCKLEY, *et al.*,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF OF APPELLEE ROBERT H. WALLIS.

ROBERT H. WALLIS,

[illegible] East Eighth Street, Long Beach 2, California,

Appellee.

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IN THE

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No. 687

JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellants,

vs.

PAUL MALLONEE, C. H. NEWHOUSE, WINNIE BUCKLIN, *et al.*,

Appellees.

BRIEF OF APPELLEE ROBERT H. WALLIS.

Preliminary Statement.

The defendant and cross-claimant in interpleader, Robert H. Wallis, because of a shortage of time, will restrict himself to matters which peculiarly affect him or in which he has taken an especial interest.

This appellee does not wish his omission of argument to be taken as an admission of the soundness of any of the arguments made by the appellants in their brief.

Factual Statement.

The Board of Directors of the Long Beach Federal Savings and Loan Association, hereinafter called the "Association" were entirely familiar with the history of the seizure by the appellants Fahey and Ammann of the Federal Home Loan Bank of Los Angeles, the merger of that solvent and prosperous $43,000,000.00 bank with the infinitely smaller, $9,000,000.00, Federal Home Loan Bank of Portland, and the transfer of the combined banks to San Francisco, under the new name of Federal Home Loan Bank of San Francisco. All of these changes had taken place on one day—March 29, 1946. They were accomplished by the issuance by the appellant Fahey, as Federal Home Loan Bank Commissioner, of three orders simultaneously. [R. 208, 293, 295]. The Association was a member of the Los Angeles Bank and its president, T. A. Gregory was a member of the Board of Directors of the Los Angeles Bank. The Association was a member of the Los Angeles Bank and had $381,000.00 [R. 287] invested in the stock of the Los Angeles Bank. All of the disaster which befell the Los Angeles Bank came upon it without warning, notice, charges, hearings or provocations, other than the refusal of its Board of Directors, including Mr. Gregory to submit to the dictation of the appellant Fahey in the election of a successor to its recently deceased president [R. 122, 287].

In order to anticipate any expected reprisal or retaliation from the appellants the directors of the Association adopted the resolution appropriating the sum of $100,-

000.00 for attorney fees, which resolution is self explanatory and is set out in full below [R. 110-111]:

> "Whereas, there have been indications that retaliation against this association by those purporting to be representing the Federal supervising authorities, because the representative of this association duly elected as director of the Federal Home Loan Bank of Los Angeles did not disregard the legal rights and best interests of said bank and submit to the dictation of the Federal Home Loan Bank Commissioner, and
>
> "Whereas, such retaliations are unwarranted and violate the principles of our democratic government and are detrimental to the best interests of this association,
>
> "Now, Therefore, be it hereby resolved that the officers of this association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs.
>
> "The sum of one hundred thousand dollars ($100,000.00) is hereby appropriated and authorized to be expended for that purpose."

That said expected retaliation was properly anticipated was borne out by the subsequent events and it was only some fifty-two days after the seizure and confiscation of the Federal Home Loan Bank of Los Angeles that the deluge descended on the Association. On May 20, 1940, without prior or any warning, or any legal evidence of his authority, the appellant Ammann appeared at the office of the Association just before business hours, and

summarily confiscated the Association with the publicly announced intention of starting a "run" on the Association and thereby tearing it down [R. 72, 73, 121].

suant to said resolution, there was given to this appellee as general counsel for the Association, a check in the sum of fifty thousand dollars ($50,000.00) to be used by this appellee as such general counsel, in resisting the appellants anticipated unlawful actions [R. 58].

This fifty thousand dollars ($50,000.00) check was the only payment made under the authority of the resolution appropriating the hundred thousand dollars. It was not cashed, but following service of the complaint on this appellee as a defendant, it was deposited in court June 12, 1946, concurrently with the filing of this appellee's answer and cross-claim in interpleader. [R. 54, 58, 218].

The above described protective measure on the part of the Board of Directors was seized upon by the appellants as their principal excuse for the seizure of the assets of the association [R. 90]. In this connection, it is to be noted that the original order for seizure, dated May 20, 1946 [R. 85 and 86] contained no factual reason whatever for the seizure of the Association. It merely recited that some unknown persons had arrived at certain conclusions of law, which in the minds of those unknown persons had led to the further conclusion that a conservator should be appointed. The association asked for a more definite statement of cause for the appointment of a conservator [R. 86-87] and in reply [R. 88-90] the

barrel was scraped for an excuse for the seizure. This was a difficult thing to do because the Association was admittedly solvent [R. 120], had grown under the same management in twelve (12) years from a humble beginning with assets of approximately seven thousand five hundred dollars ($7,500.00) to assets in excess of twenty-six millions dollars ($26,000,000.00) [R. 120 and 121], and this same management had built up profits, undivided surplus and reserves in excess of one million three hundred thousand dollars ($1,300,000.00) [R. 120-121], while continually paying dividends of two and one-half percent (2½%) to four percent (4%) per annum [R. 284].

The $26,000,000.00 assets of the Association when seized consisted of cash, negotiable securities, bearer and registered bonds, and notes secured by Trust Deeds upon southern California real estate having unpaid balances aggregating more than twelve million dollars ($12,000,000.00) and other real and personal property. All of these assets were physically located in southern California—necessarily making this an action *in rem* and strictly local in character.

Therefore the above described attempt on the part of the directors to defend the Association, its assets and surplus and profits, afforded the only appropriation of any sizeable amount which could conceivably be grasped as an excuse for this unwarranted seizure [R. 90]. Mr. Harold Lee, Deputy Home Loan Bank Commissioner, and as such appellant Fahey's spokesman, in testifying before

a Congressional Committee investigating the Federal Home Loan Bank Administration stated that his office recognized that there was nothing improper in the board of directors authorizing action to be taken to restrain the appellant Fahey and his deputies from interfering with the normal and proper conduct of the association's affairs [R. 111]. Mr. Lee explained that his objection was to the size of the defense appropriation, rather than to its purpose [R. 111].

> "Now I do want to make clear that we never have questioned and never would question the withdrawal of a fair and reasonable amount, to *challenge the authority of the Federal Home Loan Bank Administration. It has been done time and again and can always be done*, but to spend hundreds of thousands out of these mutual institutions out there in this thing, we thought, is going too far." (Emphasis added.)

Because it is known to this appellee that the appellants had expressed the view that the defense fund had been wrongfully given to him, and because of the service upon him of the plaintiffs' complaint herein, claiming the appellant's seizure to be unlawful; this appellee did what he considered to be the honorable, proper and ethical thing for a man in his position to do. He deposited the fifty thousand dollars ($50,000.00) check in the custody of the clerk of the district court [R. 218] with his cross-claim in the nature of interpleader and prayed that the court instruct and order him as to his rights and duties in

respect to the same and the funds represented thereby [R. 62].

In this connection the Court is advised that on the 7th day of April, 1947, after the filing of points and authorities, affidavits and extensive oral arguments on the part of counsel for the plaintiffs and other counsel of record, resisted, however, only by counsel for the appellants herein, the District Court granted plaintifts' motion and ordered the payment to counsel for plaintiffs of the sum of fifty thousand dollars ($50,000.00) as an interim allowance on account of attorneys' fees for services rendered prior to March 1, 1947, and in addition also ordered reimbursement to plaintiffs and their counsel of expenses incurred prior to March 1, 1947 in the sum of seventeen thousand two hundred ninety-five and 13/100 dollars ($17,295.13), *i. e.*, a total partial allowance on account, of sixty-seven thousand, two hundred ninety-five and 13/100 dollars ($67,295.13). It is submitted that this judicial recognition of the seriousness of the association's jeopardy in part, as it was based upon the expert opinions of such eminent counsel as former Justice John W. Preston of the California Supreme Court and L. M. Martineau, Jr., Esquire, in itself constitutes a complete refutation of Mr. Lee's objection to the size of the above described appropriation and destroys the principal ground claimed by the appellants as the reason for their otherwise unjustified seizure.

The appellants here, A. V. Ammann and John H. Fahey, were named cross-defendants in this appellee's cross claim

in interpleader [R. 54], summons was issued [R. 63], service was made both by mail [R. 63, 64 and 65] and by personal service in the District of Columbia by a deputy United States marshal [R. 65 and 66].

The appellant Ammann made a motion to dismiss this appellee's answer and cross-claim in interpleader, which was denied, and which is now urged as an error of the District Court in Specification No. 7 (A. B. 16*).

Specification No. 9 (A. B. 17) is a claim that the Court erred in holding that it had jurisdiction of the appellant Fahey.

Specification No. 11 (A. B. 17) contends that the lower court erred in failing to dismiss the cross-claim "because appellees have not exhausted their administrative remedies."

In this appellee's position on this appeal, particular attention will be paid to the argument supporting these specifications of error.

From the facts of the story as disclosed by the pleadings, affidavits and other documentary evidence, denied only as to intent, is developed the underlying fact that this litigation is based on but one issue, to-wit: the determination of the appellant Fahey to ruin any who might *dare* to oppose his despotic rule of the savings and loan industry in the United States.

*A. B. refers to appellant's brief.

ARGUMENT.

I.

Did the District Court Have Jurisdiction Over Appellant John H. Fahey?

Appellants argue "No" (A. B. 46 to 53).

A. The Plaintiffs' Action Is Properly Brought Under Title 28, Section 118, U. S. C.

Appellants argue (A. B. 46) the plaintiffs action was brought under 28 U. S. C. 112; when obviously it was brought under 28 U. S. C. 118.

Section 118 contains a recitation of its own jurisdictional requirements which have been met by the plaintiffs' complaint. It is to be noted:

(a) There are claims to and clouds on the title [R. 302] to some eight thousand (8,000) parcels of real [R. 37] and personal property admittedly located in the district in which the action is brought (A. B. 49), as a result of the unlawful and unwarranted actions of the appellants Fahey and Ammann.

(b) One or more of the defendants are not inhabitants of or found within said district. (Affs. Ray E. Dougherty [R. 261] and Robert H. Wallis [R. 304] and return of service of United States Marshal filed [R. 46] herein.)

(c) The plaintiffs are trying to remove the claims to and clouds on the title to the real and personal property above described, all of which is located in the Southern District of California.

(d) The court has made an order requiring the absent defendants to appear [R. 43] and pursuant to said order the defendant and appellant Fahey has been served and

has appeared [R. 200], although claiming to appear specially, in this case.

(c) The person in possession or in charge of the property to-wit, the appellant Ammann has been served [R. 19].

B. The Appellants Have Improperly Cited Section 112 of Title 28 U. S. C.

Apparently, counsel for the appellants overlooked the fact that Section 112 expressly makes an exception to actions brought under certain sections of the Code, including Section 118. The entire argument raised by these defendants based on the erroneous assumption that Section 112 is applicable here becomes irrelevant and immaterial when this exception is observed.

C. A Severing of the Initial Action and the Cross Actions in Interpleader Filed by the Defendants Title Service Company and Robert H. Wallis Would Result in a Separate Determination in Each of the Three Actions and Cross-Actions Upon Many of the Same Issues.

In such an event the findings and conclusions of the Courts in the various actions might be in conflict and might require appeals for clarification and would entail hardship and unnecessary expense on all parties. The only advantage apparent in such result to the appellants would be the wearing down of the plaintiffs and cross-complainants in interpleader, appellees here, through hardship, harassment and expense.

If it should be necessary to recommence this action and/or the cross-actions in the District of Columbia following dismissal here, the parties, residents of California, where the property is located, would be forced to assume

the arduous effort and almost impossible expense of asserting their rights in the jurisdiction of the District of Columbia, some 3000 miles away, all because one defendant had an official residence in that district. The unfairness of such a situation is discussed by the Supreme Court in the case of:

First National Bank of Canton v. Williams, 252 U. S. 504.

In this case the plaintiff, a national bank, brought suit in the District Court in the State of Pennsylvania to enjoin the Comptroller of the Currency from doing certain things under color of his office, declared to be threatening, unlawful, arbitrary and oppressive. The Comptroller was in Washington, D. C., and a subpoena was served on him there by the United States Marshal. He challenged the jurisdiction of the District Court and there prevailed. However, this Court held the District Court had jurisdiction and reversed the District Court.

Other cases giving a liberal construction to Section 118 on the point of jurisdiction are:

Dick v. Foracker, 155 U. S. 404;

McBrunney v. Carson, 99 U. S. 567, 549;

Spellman v. Sullivan, 43 F. (2d) 762, affirmed 61 F. (2d) 787;

Bede Steam Shipping Co. v. New York Trust Co., 54 F. (2d) 658, 662;

Fischer v. American Life Ins. Co., 314 U. S. 549.

Metropolitan Life Insurance Co. v. Skov, 45 F. Supp. the District Court in Oregon held that the power to serve process in other district will be implied, where not speci-

ally conferred, if the nature of the cause under this section so authorizes, service may be had anywhere in the United States and only one defendant need reside in the district.

The courts have generally given a liberal interpretation to Section 118.

Port Angeles Western R. Co. v. Callam County, Wash., 20 F. (2d) 202, which, it should be noted, was a decision by a three judge statutory court.

To the same general effect see *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

Inasmuch as this is the only court in which complete relief may be afforded, it is submitted that the action should not be dismissed against the appellant Fahey over whom jurisdiction had been obtained in this action by order of the court duly made and carried out.

D. Wallis' Interpleader Cross-Claim Brought Under Title 28, Sec. 41 (26), Rule 22 F. R. C. P. and General Equity Powers of Court Establishes the Jurisdiction of the District Court Independently of the Plaintiffs' Action.

Insofar as the cross action in interpleader commenced by this appellee is concerned, that cross action was brought under Title 28 U. S. C. 41 (26), Rule 22 Federal Rules of Civil Procedure and the long established equity powers of the United States District Courts; and jurisdiction having been acquired under these authorities, the District Court thereby became possessed of all of the powers conferred upon district courts to hear and determine the case and to issue injunctions and to enter all such other orders and decrees as might be necessary or convenient to carry out and enforce its jurisdiction.

Subsection 26(c) of this section provides as follows:

> "(c) Notwithstanding any provisions of the Judicial Code to the contrary, said court shall have power to issue its process for all of such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any United States court on account of such money or property or on such instrument or obligation until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine *and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.*" (Emphasis added.)

The leading case covering federal jurisdiction in proceedings in interpleader, and the one most nearly in point in the instant case is that of:

> *Railway Express Agency, Inc. v. Jones, et al.*, 106 F. (2d) 341,

decided by the Circuit Court of Appeals of the Seventh Circuit. The facts in that case are analogous to those in the case at bar in that a class suit was originally instituted by one Jones, who, with many other of diverse citizenship had been victims of a nationwide fraud, to-wit: the infamous Sir Francis Drake Estate solicitation. The proceeds of the fraud, in money, had been shipped by express and were actually in the hands of the appellant express company when the fraud was discovered and the action filed. Jones, on his own behalf, and for the other victims, all of whose individual losses had been less than $500.00, but which aggregated in excess of $24,000.00, commenced an action against the perpetrators of

the fraud and the express company. The appellant express company filed an affirmative defense by a bill in the nature of interpleader admitting the possession of the funds, admitting no interest therein, but alleging the adverse interests of the plaintiff and other members of the class represented by him on the one hand, and the claim of the Collector of Internal Revenue who had appeared in the action and asserted a claim and lien on the funds by reason of non-payment of income tax by the principal perpetrator of the fraud, on the other hand, the unpaid tax being far in excess of the money held. The motion of the express company to be allowed to interplead was, by the trial court, denied, and the express company appealed. The two points raised on appeal were: (1) the right of Jones, based on the pleadings, to maintain a class suit, and (2) whether or not the express agency was within its rights in filing a counter-claim setting forth a cause of action in the nature of interpleader. The Circuit Court of Appeals held that whether or not any of the individual claimants had claims within the statutory amount (over $500.00), the express company was entitled to file its equitable defense in interpleader and the court stated at page 344:

> "The Railway Express Co.'s right to file its interpleader is not established nor defeated by the merits of plaintiffs' claim . . .
>
> "Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section (41) (26) is absolute."

and at page 345:

> "By proceeding under the counter-claim of the railway express the jurisdiction of the court was not

assailable and the claims of all claimants may be litigated exacted the same as in a proper class suit.

"It therefore follows that as a matter of wise discretion, *as well as of recognizing a right which the railway express possessed absolutely.* The court should after the counter-claim was filed, have proceeded as provided for in the interpleader statute." (Emphasis added.)

The foregoing case is very well reasoned and appears to set at rest the question of jurisdiction in those cases anticipated by subdivision (c) of the interpleader statute, *supra*, of the rights to introduce an equitable defense in interpleader or by bill in the nature of interpleader. It likewise conclusively established the jurisdiction in the District Court to take and maintain jurisdiction of all other parties to the action regardless of whether or not the court would otherwise have had jurisdiction of them. This case is likewise authority for the bringing of a class action as was filed by the plaintiffs and appellees Mallonee, *et al.*

This appellee, Robert H. Wallis, physically deposited his $50,000.00 certified check in the Registry of the Court [R. 218].

Triones v. Sunshine Mining Co., 308 U. S. 66 at 70 in which this Court held that in such case, service may be had upon any claimant to the interplead property anywhere in the United States ~~and (pp. 71-72)~~ that only one defendant need reside in the district of suit.

See, also:

Metropolitan Life Insurance Co. v. Skov, 45 F. Supp. 140.

E. The Cross Claim in Interpleader of Robert H. Wallis Is Within the Provisions of Subdivision 26, Section 41, Title 28 U. S. C.

An analysis of the requirements of the section and the facts here demonstrates conclusively that said requirements are here met:

Requirements.	Facts.
(a) The bill must be verified.	It is:
(b) The interpleader must have in his custody or possession, money or property of the value of $500.00 or more.	He had property of a value of $50,000.00
(c) There must be two or more claimants.	There are four defendant claimants, to wit: The defendants John H. Fahey, A. V. Ammann, Robert H. Wallis and Long Beach Federal Savings and Loan Association. There are also the persons named in paragraph X of the Cross Claim in Interpleader of the defendant Wallis who will present claims against this fund. There will probably be other claimants. Some of the persons named in Paragraph X are not citizens of the State of California.
(d) Two claimants must be citizens of different states, and the suit	Long Beach Federal Savings and Loan Association is a resident of California;

must be brought in the district where one or more claimants reside.	Cross-Claimant is a resident of California; Cross-defendant Fahey is a citizen of Massachusetts (see affidavit of Ray E. Dougherty attached motion to dismiss or quash service of complaint herein [R. 261]. The residence and citizenship of the defendant Ammann is the State of Maryland [R. 304]. The Claimant Robert H. Wallis is a citizen of the State of California.
(e) There must be a deposit into the Registry of the Court.	This was done at the time the answer and cross-claim were filed.

It follows that all of the necessary jurisdictional requirements have been met by cross-claimant, Robert H. Wallis.

F. Defendants A. V. Ammann, John H. Fahey, and Long Beach Federal Savings and Loan Association Are Adverse Claimants to the $50,000.00.

Various defendants have made demands on this cross-claimant, and the cross-complainant is not charged with the knowledge, nor does he know what the defendants Fahey and Ammann would do with the money if they, or either of them, received it. All the interpleading party need know is that there are adverse claims made for the property interplead.

Such is the purpose of a proceeding in the nature of interpleader. To dismiss this cross-claim on the ground

of lack of adversity would require disregarding the allegations of the cross-claim and the uncontradicted affidavits filed herein [R. 54-62; 110].

G. Diversity of Citizenship.

It is submitted the amendment to Sec. 41(1) U. S. C. A. is the section fixing the general jurisdiction of the court and includes subdivision (26) of the same section within its scope.

H. Argument That Interpleader Is Not Available to This Appellee.

This cross-complainant "had a right to resort to the remedy of interpleader regardless of what other remedies were available," as said in the case *Hunter v. Federal Life Insurance Co.*, 111 F. (2d) 551, 556 (1940), the District Court having assumed jurisdiction, the Circuit Court of Appeals, Eighth Circuit, stated the District Court "has the power to grant full relief, including the allowance of a proper set-off against any particular claim growing out of any contract which entitled a claimant to pursue the fund."

See also:

American Surety Co. v. Calcasieu Oil Co., 3 F. Supp. 939, 941.

There can be no question but that the cashier's check interplead is property within the meaning of the act.

Omaha National Bank v. Federal Reserve Bank, 26 F. (2d) 884.

I. Adversity of Claimants.

The appellants have indicated by footnote (A. B. 98n46) that it is doubtful whether the interpleader statute applied where some of such adverse claimants are citizens of the same state. Apparently, in making this statement, the appellants have overlooked the fact that the appellant Fahey is a resident of Massachusetts [R. 260] and that the appellant Ammann is a resident of Maryland [R. 304]. This contention seems to be adequately disposed of by Subsection (b) of the interpleader statute, 28 U. S. C. 41(26), which provides as follows:

> "Such a suit may be brought in the district court of the district in which one or more of such claimants reside or resides."

This contention was likewise adequately disposed of in the case of *Treines v. Sunshine Mining Co.*, 308 U. S. 66. In that case, this Court stated at page 70 as follows:

> "As required by the Act, this case was begun by the claimant, a corporation of the State of Washington, impleading one group of claimants who are citizens of that same state, and another, the adverse group, who are citizens of Idaho. Under the interpleader act, this identity of citizenship is permissible, since diversity only between claimants is required."

Appellants have ignored the fact that this appellee and those to whom he has committed portions of said $50,000.00 are also claimants or probable claimants all adverse to the claims of appellants Fahey and Ammann. The claims of the defendants Fahey and Ammann are adverse to the claim of the Association and Wallis in that while both claim to act for the same principal, their asserted uses of the money and demands for possession are inconsistent and adverse.

J. The District Court Has General Equity Jurisdiction.

Texas v. Florida, 306 U. S. 398, discussed at length in annotations 121 A. L. R. 1200 *et seq.* and in 83 L. Ed. 794. In that case this Court stated:

> "When, by appropriate procedure, a court possessing equity powers is in such circumstances asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims, a justiciable issue is presented for adjudication which, because it is a recognized subject of the equity procedure which we have inherited from England, is a 'case' or 'controversy', within the meaning of the Constitutional provision:" (p. 407.)
>
> ". . . . the gist of the relief sought is the avoidance of the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing. These risks are avoided by adjudication in a single litigation binding on the parties." (p. 412.)

To the same effect:

> *Harris v. Travelers Insurance*, 40 F. Supp. 154, 157.

The court in *Railway Express Agency, Inc. v. Jones*, 106 F. (2d) 341 held that having established "the essential and jurisdictional facts prescribed by the Statute, his right to relief under this section is absolute." (p. 344), and continued

> "By proceeding under the counter-claim of the Railway Express Company, the jurisdiction of the Court will be unassailable and the claims of all claimants may be litigated exactly the same, as in a proper class suit."

K. Even if the Original Action Should be Dismissed, the Interpleader Cross Actions Must Stand.

If counter-claims set up causes of action within the jurisdiction of the court as a court of equity they should not be dismissed, and on dismissal of the original action should be treated as original bills.

In no other district or court may complete relief be afforded. The District Court below has jurisdiction and the appellants have not disproved it.

Appellants contend that a dismissal of the complaints of the appellee shareholders and the appellee association would necessarily lead to the dismissal of the interplead cross-claims which are claimed to rest upon the main claims (A. B. 29). Which interplead cross-claims are supposed to rest upon the main claims is not divulged. If the cross-claim of Robert H. Wallis is intended to be included, this appellee takes sharp issue with the appellants unsubstantiated statement for this appellee's cross-claim in interpleader stands upon its own and should be treated as an original bill if the original action should be dismissed.

Vidal v. South American Securities Company, 276 F. 855 at 874.

It is to be further pointed out that no argument is advanced by the appellants in support of their contention that Section 118, Title 28, U. S. C. is not applicable to the pending action, and much less to the cross-claims in interpleader. The appellants themselves have conceded that the cross-claims in interpleader are properly brought in the district of suit when they make the following statement (A. B. 48):

"Obviously, the section is confined to suits which are local in the sense of relating directly to specific

> property, real or personal, within the district of suit or partly therein and partly in another district of the same state."

On page 49 of their brief the appellants further stated:

> "The property and asset of Long Beach, are admittedly within the territorial jurisdiction of the lower court."

Appellants then go on to argue that the crux of the relief sought is not against the property, but personal decrees against appellants Fahey and Ammann (A. B. 49). In making this argument appellants apparently overlooked the cross-claims in interpleader, for there the decrees sought are strictly against the property and not personal decrees against the appellants Fahey and Ammann.

In commenting on the service on the appellant Fahey of the cross-claims of the appellees Title Service Company and Robert H. Wallis, appellants have admitted (A. B. 53, note 24) that the interpleaders deposited their money into court "under Judicial Code, Section 24 (26), 28 U. S. C. 41(26)." Appellants then impliedly admitted that while such service might be valid for the purpose of determining the claims to the property deposited in the Registry of the Court by the cross-claimant it did not bring the appellant Fahey within the court's jurisdiction for the purpose of granting personal relief requested in the original complaint (A. B. 53).

In other words, appellants contend that while the court may have jurisdiction over the appellant Fahey in some particulars it does not have it in others, but appellants only express a doubt that jurisdiction over the appellant Fahey has been obtained in so far as the bringing of cross-claims in interpleader is concerned.

II.

Appellant Fahey Is Not an Indispensible Part to the Granting of the Relief Sought by This Appellee.

If multiplicity of suits is to be avoided, appellant Fahey is clearly a desirable party to the cross-claim of this appellee in interpleader, but this desirability does not make him an indispensible party, nor does it challenge the propriety or sufficiency of the service made upon him as described above. Appellants apparently did not take this point very seriously for while they raise it they state on page 56 of their brief, "We shall not argue the point." We take it from this comment that at least so far as the interpleading cross-claimants are concerned that the argument that the appellant Fahey is not a *proper party* to the cross-claims of the appellees Title Service Company and Robert H. Wallis is abandoned.

On the subject generally of joining the superior in an action against a local subordinate (A. B. 55 and 56; Note 26), only one of the cases was cited is in point and this is the case of *Naher v. Harwood*, 128 F. (2d) 848 at 849; certiorari denied, 317 U. S. 659. There the superior was held not to be an indispensible party where the constitutionality of the statute authorizing the administrative action was assailed. To the same effect see *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Ryan v. Amazon Petroleum Corporation*, 71 F. (2d) 1, and *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152, in which this Court on certiorari citation entertained this case on the merits in the absence of the Secretary of Agriculture.

See, also:

Colorado v. Toll, 268 U. S. 228;
Jarvis v. Shachelton Inhaler Co., 136 F. (2d) 116;
Esquire, Inc. v. Walker, 155 F. Supp. 1015;
American School v. McAnnulty, 187 U. S. 94;
Homer Glen Wilcox v. DeWitt, 144 F. (2d) 353.

It follows that if Section 5(D) of the Act is unconstitutional, the appellants in their representative capacities could have no claim to the property deposited in interpleader and the courts would require an idle act were the appellants to remain cross-defendants in interpleader after their action seizing the association had been found to be unlawful, and section 10 of the Decree [R. 499] holding that neither of the appellants in their representative capacities had any right, title, interest or claim to any of the properties interplead and deposited with the clerk by the defendants and cross-claimants in interpleader and that the appellants here, in their respective capacities, were permanently enjoined from ever asserting any claims, right, title or intrest in or to said property or any of it, was well justified by the record.

Judge Paul McCormick of the Southern District of California, in the case of *Coca-Cola Company v. Los Angeles Brewing Company*, 1 F. R. D. 67, in passing on a motion for a preliminary injunction to restrain the use of the term "coke" after ascertaining that a further hearing would be useless, proceeded to make his injunction permanent and in doing so used the following language in his opinion:

> "What is there here that can be modified or changed or that needs any further exploration? What factual situation is there that could be more

> definitely presented to the court in January than today? I think there is nothing. There may be many more affidavits filed on each side of the question. There may be a great deal of oral testimony developed on both sides of the issue. There may be extensive arguments made as to the effect of these matters, but upon analysis, the same issue will be present. If this is the case it should be determined summarily."

It appears to this appellee that either the disputed section is constitutional or is unconstitutional regardless of whether or not the appellant Fahey has been properly served or whether additional hearings are had. Neither the appellant Fahey nor anyone else can change the language of the Act. Mr. Fahey's most valuable contribution to a determination of the constitutionality of Section 5(d) of the Act is his assumption that the Act gives him full power at his own despotic caprice to seize institutions, built up by the life time efforts of American citizens, without complaint or hearing and by contending that the owners of the assets of a federal savings loan association are not privileged to any relief against him, or to use their own money to oppose him except perhaps in an administrative tribunal of his own choosing and subject to his own review. That an Act can be constitutional which will permit the appellants to so interpret their rights as to constitute themselves the plaintiffs, the investigators, the prosecutors, the trial judges, and the appellate judges of their own misdeeds is beyond the comprehension of this appellee. It is significant that the appellants did not, in the District Court, prior to the date of the decree, deny their bias, prejudice, and malice, although they have frequently been charged with the same [R. 101, 110, 113, 121, 122, 123, 131].

III.

The Answer and Cross-claim of This Appellee Raises the Issue of Unconstitutionality.

A. Paragraphs I, III, IV, VIII and X of appellee Wallis' cross-claim [R. 54-60] raise the issue of the constitutionality of Section 5(d) of said Act. If the Act is not constitutional the claims of the appellants will fall with it and the money represented by deposit in interpleader can then be distributed on the claims of the remaining cross-defendants.

B. If the appellant Fahey had no power to appoint a conservator under Section 5(d) of the Act there is no conservator to make a claim and, so far as this appellee is concerned, no occasion for an administrative hearing and no possible estoppel. This last statement becomes even more emphatic when it is realized this appellee did not ask for an administrative hearing, was not served with notice of such a hearing and knew that if any were held it would be prejudged for he had attended the Congressional Hearing [R. 104-118] and heard the appellant Fahey, (the head man) refer to the president of the Association's "unscrupulous practices" [R. 105] of course without naming any.

> "Mr. Lee: I don't think Mr. Gregory can ever get it back from that institution" [R. 110].

meaning the Federal Home Loan Bank Administration, or in the words of the appellant Fahey:

> "Mr. Lee: I am afraid they (the directors) will get backs . . ." [R. 110.]
>
> "Mr. Lee: What they were trying to do here was take this institution and do with it as they saw fit." [R. 117.]

Can one expect, or have any hope of a fair and impartial hearing from people who openly admit they are going to try to keep you out? Isn't it bad enough to try to be required to be heard by the party you want to sue? If appellants hadn't made the argument an administrative hearing was a prerequisite to suit, this appellee would not have taken it seriously.

IV.

Section 5(d) of Home Owners' Loan Act Constitutes an Unlawful Delegation of Legislative Authority.

The three-Judge Statutory Court below, after carefully considering the voluminous Points and Authorities and affidavits of the respective parties, and after listening to the arguments of respective counsel on the various motions presented to it, called for further briefs on the question of constitutionality [R. 318]. This was done by the various counsel. After considering the same, the Court no doubt, and properly, believed all parties had exhausted the subject of constitutionality and rendered its opinion, stating, in part, as follows [R. 376-378]:

> "It is argued that subsection (d), in attempting to authorize the board to make rules and regulations for the purposes mentioned in said subsection (d) delegates legislative power to the board without prescribing either adequate, or any statement of policy, standards, limitations or criteria to guide the board in exercising its functions and is contrary to Article I, Section 1, and Article I, Section 8 (paragraph 18), of the Constitution of the United States (U. S. C. A. Constitution, Article I, Sec. 8, Clause 18).

It is agreed that functions of the legislature may not be delegated by the Congress to any executive or executive department, hence, there is posed a single question for determination, to wit: Has the Congress made such a delegation in the sections of the Act under consideration? Fortunately the course to be followed in determining questions of this character had been well chartered by the Supreme Court of the United States. We have but to endeavor to make the proper application of the principles by said court enunciated to the conditions existing in the matter before us. We refer particularly to Panama Refining Co. v. Ryan, 293 U. S. 388, and Schechter v. U. S., 295 U. S. 495. We look to the statute to see whether the Congress has declared a policy with respect to the providing of rules and regulations for the reorganization, consolidation, merger, or liquidation of federal savings and loan associations, including the power to appoint a conservator or receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital stock of the same; and to release any such association from such control and permit its further operation;—'Whether the Congress has set up a standard for the president's (board's) action; whether the Congress has required any finding by the president (board) in the exercise of the authority' to do the things enumerated in Sec. 5(d) of the Act. (Panama Refining Co. v. Ryan, *supra*, p. 415.) It may be said of Sec. 5(d), as was said of the section involved in the Panama case, that it is 'brief and unambiguous.' It makes no attempt to lay down rules for the guidance of the board, nor does it state in what circumstances or under what conditions the board is to merge institutions or appoint a conservator or receiver. It establishes no criterion

to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger, or appointment of conservator. The section gives to the Board unlimited authority to formulate rules for the board's action in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. We are unable to find in the Act a declaration of policy, or standard of action which can be deemed to relate to the subject of section 5(d).

The Los Angeles Bank, with assets of $43,000,000 was merged with a Portland bank and later both with a bank in San Francisco. While the legality of this merger is not before us, we consider it because the aim of a statute may be learned 'both from its terms and from the administrative practice under it.' Schechter v. U. S., *supra*. The merger was made without notice or hearing of any character. In fact, none is required by the statute and herein lies a fatal defect as to its constitutionality.

We think due process requires a hearing on notice and this should be provided within the Act itself.

Comparison of the Home Owners Loan Act of 1933, as amended, under consideration here, with other acts of Congress which have been held unconstitutional because of improper delegation of legislative power, demonstrates that said Home Owners Loan Act fails to set up as comprehensive and definite statements of policy, standards, guides, criteria and limitations as do those acts.

We hold Section 5(d) of Home Owners Loan Act of 1933, as amended, unconstitutional and void as

attempting to delegate legislative power to the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act."

The opinions in the cases of:

A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495;

Panama Refining Co. v. Ryan, 293 U. S. 388;

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48;

Morgan v. United States, 304 U. S. 1;

Butler v. United States, 297 U. S. 1;

Carter v. Carter Coal Co., 298 U. S. 238;

Yick Wo v. Hopkins, 118 U. S. 356;

Coe v. Armour Fertilizer Works, 237 U. S. 413;

Ohio Valley Water Co. v. Ben Avon Burrough, 253 U. S. 287

are all to similar effect.

It has been aptly said, "The law must be stable and yet it cannot stand still." It is submitted, however, that this old concept should not be distorted to read: "The law must not stand still long enough to become stable." This latter statement is popularly ascribed to Justice Cardozo, although specific authority for it has not been found. The problem of how much authority should be given to an administrative body is not a new one, and the principles involved and nationally recognized, were considered by the founding fathers of our nation, as was so ably discussed in the decision of this Court, contained in most of the law school case books, in the case of *Yick*

Wo v. Hopkins, 118 U. S. 356. We quote from pages 369 and 370, as follows:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The above case has been cited many times, and that it is still considered to be a live expression of the law, is evidenced by the reference to it by Mr. Justice Frankfurter in the recent case of *United States v. United Mine Workers*, 91 L. Ed. Adv. 595.

AIM OF STATUTE FROM ADMINISTRATIVE PRACTICES.

The aim of a statute may be learned "both from its terms and from the administrative practice under it."

Schechter Corp. v. U. S., 295 U. S. 495, concurring opinion of Justice Cardozo, p. 553.

The appellants' actions certainly contribute the aim of the statute as being to give to themselves unbridled power to do as they see fit and that whatever they choose to do is within the authority of the act even such actions as here where no one bothered to make any charges, or suggest any corrections or permit of any explanation or have any hearing or make any findings or permit of any witness' other testimony or cross-examination or consider the soundness of the institution over a period of many years. Apparently the act did not give to the directors a presumption of good faith or consider that with their years of experience they might know something about the business or the best interests of the shareholder members nor did they construe the act as requiring consideration being given to the shareholder members or depositors or that it was a serious matter to take management away from the elected representatives of the owners or that their capricious action would becloud the titles to some 8,000 homes.

As administrative practice is an aid in interpreting a statute this statute Sec. 5(d), can only be interpreted

as having no safeguards, policies, restrictions or guides limiting Emperor Fahey from seizing any institution which failed to vote for his choices to handle their money. After seizing and/or merging the institution he might graciously, on demand, allow a hearing before his representative but would not allow a review of his actions in court.

V.

Estoppel.

Although appellants argue "Appellees are estopped from contesting the validity of Section 5(d)". (A. B. 35), the argument in support of this contention ignores the appellees Wallis and Title Service Company. It is understood why they are ignored—on this point, for the argument cannot apply to either of them, as neither were organized or existed under any Act of Congress with which the Home Loan Bank Administration has any jurisdiction.

Appellee Wallis in his cross-claim independently raised the constitutional issue and appealed directly to the Court [R. 54-63].

Even if the argument could be directed against this appellee it is not well taken aside from the fact that no hearing could be required under an enactment itself unconstitutional.

The scope of the authority assumed by the appellant Fahey is beyond any conceivable valid grant. As Justice Cardozo stated in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 at page 551:

> "There can be no grant to the executive of any roving commission to inquire into evils, and upon discovering them, to do anything he pleases to correct them."

The appellants' objection to the plaintiffs and others having recourse to the courts for protection against themselves is a reversal to the position taken by the Federal Home Loan Bank Administration in the hearings by the Congressional Committee. There Mr. Lee testified:

> "Now, I do want to make clear that we never have questioned and never would question the withdrawal of a fair and reasonable amount to challenge the authority of the Federal Home Loan Bank Administration. It has been done time and again, and can always be done." [R. 118.]

In the case of *Morgan v. United States*, 304 U. S. 1, this Court had before it the validity of the order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies. A district court of three judges dismissed the complaint and the plaintiffs appealed. There had apparently been no objection to the holding of an administrative hearing or bias on the part of the hearers, but the Court there did find abuse of safeguards in the administration of the statute, and pointed out in considerable detail what safeguards and standards were required. The Court stated at page 14:

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system of adherence to the basic principles that the legislature shall appropriately determine the standards of administrative proceedings of a *quasi*-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing' es-

sential alike to the validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard' . . . and in equipping the Secretary of Agriculture with extraordinary powers under the Packer's and Stockyards Act the Congress explicitly recognized and emphasized this requirement by making his action depend upon 'FULL HEARING.'" (Emphasis by the Court.)

The following language which appeared on page 18 might well be used in referring to the power to appoint a conservator:

". . . but a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also the opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the government in the *quasi*-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

Even if the provisions of Section 5(d) of the Home Owners' Loan Act of 1933 had included as a condition precedent, the holding of an administrative hearing, upon which it is entirely silent, the foregoing language would have been most applicable to it. However, since the Act did not contain any such provision, and in the exercise of its legislative power claimed to have been conferred upon it by said subsection, the Federal Home Loan Bank Administration attempted to supply the same by

providing its own administrative hearing. Without admitting that such an administrative hearing, if provided for to be held prior to the appointment of a conservator would have in any way strengthened the position of the appellants, it is definitely noted and the attention of the court is invited to the fact that such administrative hearing is only provided for after the seizure of the property by a conservator. The following language taken from page 23, is illustrative of what an act should contain which purports to make such delegation of legislative discretionary power as does that in the instant case:

> "The maintenance of proper standards on the part of administrative agencies in the performance of the *quasi*-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concept of fair play."

Added to the fatal defects contained in the act under consideration in the case described above, we have in this case, the attempt on the part of a federal official, the appellant Fahey, to hold an administrative hearing by his own representative to recommend to himself the ultimate finding as to whether or not his superior had acted in good conscience and within his constitutional rights in seizing the Association, and if the appointed examiner were familiar with the previous utterances of his superiors in the Congressional Hearing, as described above, he would no doubt know what recommendations he was expected to make.

VI.

Distinction Between Conservator and Receiver.

Appellants have used twelve (12) pages (A. B. 58-72) in an effort to convince the Court that the mere connotation of the word "conservator" amounts to a sufficient guide to clothe Section 5(d) of Home Owners' Loan Act of 1933 with a constitutional garb, although the appellants have cited *Smith v. Witherow*, 102 F. (2d) 638, 642, as holding that the conservator's appointment is the "equivalent of the appointment of a receiver of a corporation with leave to continue the business and quite similar to the appointment of a trustee in a proceeding for the re-organization of a corporation under the Bankruptcy Act, 11 U. S. C. A., Section 207." The notation referred to evidences the paternity of a receiver in a constitutional judicial body, *i. e.*, a court, but it still leaves the paternity of a "conservator" highly in doubt.

It is submitted that the effort to make such a distinction is based upon a hope on the part of the appellant Fahey that by appointing a conservator instead of a receiver, it might not appear too obvious that he was attempting to usurp an additional judicial function in so doing.

Conclusion.

The decree of the District Court appealed from herein should be upheld and for the following reasons:

1. The trial court had absolute jurisdiction of the subject matter and of the parties introduced by the cross-claim in the nature of interpleader of this appellee, as well as the broad equity jurisdiction to determine the issues raised in the pleadings in the original action;

2. Section 5(d) of the Home Owners' Loan Act is unconstitutional and all acts done under its supposed authority fall with it;

3. The appellant Fahey was not an indispensable party to the determination of the issue of the constitutionality, nor to the determination of the cross-claims in the nature of interpleader;

4. No one, certainly not this appellee, is estopped from contesting the validity of Section 5(d);

5. An act repugant to the Constitution cannot become valid by estoppel;

6. Under Section 54 of the Federal Rules of Civil Procedure the decree was not premature and nothing could be gained by delaying a decision;

7. Had the trial court held otherwise than as it did, there would have been a multiplicity of actions on the same subject and a greater delay in bringing them before this tribunal for final decision;

8. If an administrative official is to be permitted to usurp the powers of the courts by acting as defendant, witness, prosecutor, judge and sole court of appeal, there will be little justification for the statement that this "is a government of laws and not of men."

Respectfully submitted,

ROBERT H. WALLIS,

Appellee.